In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 886

ABRAHAM C. BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

We do not oppose the granting of a writ of certiorari in this case.

The facts are sufficiently stated in the petition for writ of certiorari. The Appendix to that petition contains the pertinent statutory provisions and rules promulgated by this Court with reference to appeals in criminal cases.

The question of principal importance presented by the case is whether under Section 128 (a) of the Judicial Code, first paragraph, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 225 (*a*)), and as modified by Rule III of the Criminal Appeals Rules promulgated by this Court on May 7, 1934, a final appealable judgment results from a sentence which imposes a definite term of

imprisonment but provides that *execution* of the sentence shall be suspended and the defendant placed upon probation. The Circuit Court of Appeals was of the opinion that from the standpoint of appealability there was no substantial difference between such a sentence and the situation where the *imposition* of sentence has been suspended, as to which it had held in *United States* v. *Lecato*, 29 F. (2d) 699, and other decisions that an appeal would not lie (R. 44).

While the question does not seem to have been considered by any other Circuit Court of Appeals and has never been passed upon by this Court, the petitioner cites several state decisions which hold that for purposes of appeal there is a difference between suspension of the imposition of sentence and suspension of the execution of sentence and that an appeal will lie where sentence has been imposed and only its execution suspended during probation (Br. p. 17 *et seq.*). The question is obviously one of importance both from the standpoint of the Government and of defendants in Federal criminal cases. As is pointed out by the petitioner (Br. p. 22), a defendant who has been sentenced for a felony may, even though the execution of his sentence has been suspended and he has been placed on probation, nevertheless suffer permanent deprivation of civil rights without review of his conviction by an appellate court if the court below was correct in holding that an appeal is not permitted from such a sentence. Moreover, as the District

Court has the power to place a defendant upon probation at any time before he is actually committed to imprisonment,[1] many district judges, in view of the decision of the Circuit Court of Appeals in the instant case, will undoubtedly resort to the practice, in order to preserve a defendant's right of appeal, of postponing consideration of the question of probation until after appellate proceedings have been concluded. It is evident, therefore, that the question has an important bearing upon the administration of the Probation Law.

If a final judgment results from a sentence of imprisonment the execution of which has been suspended and the defendant placed on probation, it is apparent that the petitioner's appeal from the sentence of December 29, 1936, was a proper appeal, that the District Court was without power while that appeal was pending to enter its judgment of January 28, 1937, reimposing the prior sentence and sentencing the petitioner, in addition, to a nominal fine (*United States* v. *Habib*, 72 F. (2d) 271 (C. C. A. 2d), and cases cited) and that it would consequently be unnecessary for this Court to consider the petitioner's appeal from the second judgment.

If, however, the Circuit Court of Appeals was correct in holding that the sentence of December 29, 1936, was merely interlocutory, there arise sev-

[1] See decisions cited in petitioner's brief at pages 14–15; cf. Rule V of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

eral questions with reference to the resentence of January 28, 1937, which are not free from doubt; namely, whether the resentence was divisible so that an appeal would lie from that portion thereof which imposed the fine, and also whether the imposition of the fine may be considered as a consent judgment, in consequence of which the petitioner was precluded from a consideration of the merits of his appeal. There may also arise questions with reference to the validity of the resentence of January 28, 1937, which may, to some extent, depend upon whether the appeal from the first sentence of December 29, 1936, may be considered as a nullity. For these reasons it is not suggested that review be limited to the principal question which the case presents.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
JOHN T. M. REDDAN,
W. MARVIN SMITH,
Attorneys.

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